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No. 94-806

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REV. WILLIAM LAWSON ET AL., APPELLANTS,

ROBERT REYES, ET AL., APPELLANTS

v.

AL VERA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

I. Whether Texas' Congressional Districts 18, 29 and 30 should have been sustained even before reaching the issue of strict scrutiny because race did not predominate in the construction of these districts, where:

   a. "ideally" compact versions of Districts 18, 29 and 30 were rejected for incumbent protection and other non-racial reasons;

   b. the versions of Districts 18, 29 and 30 adopted by the Texas Legislature were no more irregular than majority-white districts; and,

   c. areas included within Districts 18, 29 and 30 share common interests other than race?

II. Whether Texas' Congressional Districts 18, 29 and 30 are narrowly tailored to serve a compelling interest?

III. Whether plaintiffs who have proved no injury have standing to challenge a State districting plan as a "racial gerrymander"?

PARTIES TO THE PROCEEDING

The State Appellants (No. 94-805) are Texas State officials George W. Bush, Governor, Bob Bullock, Lieutenant Governor, Pete Laney, Speaker of the House of Representatives, Dan Morales, Attorney General, and Antonio O. Garza, Jr., Secretary of State.

The Lawson Appellants (No. 94-806) are Rev. William Lawson, Zollie Scales, Jr., Rev. Jew Don Boney, Deloyd T. Parker, Dewan Perry, Rev. Caesar Clark, David Jones, Fred Hofheinz and Judy Zimmerman.

The LULAC Appellants (No. 94-806) are Robert Reyes, Angie Garcia, Robert Anguiano, Sr., Dalia Robles, Nicolas Dominguez, Oscar T. Garcia, Ramiro Gamboa and League of United Latin American Citizens (LULAC) of Texas.

The United States is the Appellant in No. 94-988.

Appellees are Al Vera, Edward Blum, Edward Chen, Pauline Orcutt, Barbara L. Thomas and Kenneth Powers.

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The August 17, 1994 opinion below is reported at 861 F. Supp. 1304 and is reproduced at TX J.S. 5a-84a.[1]

JURISDICTION

Timely Notices of Appeal were filed by the Lawson Appellants on October 3, 1994 and by the LULAC Appellants on September 29, 1994 (amended on November 4, 1994), respectively. TX J.S. 1a, 4a. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and §§ 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973c, are set out at TX J.S. 2, 87a-88a.

STATEMENT

Proceedings Below

Appellees, six Republican Texas voters (including an unsuccessful Republican candidate in the 1992 general election in District 18) filed suit on January 26, 1994, challenging at least 24 of Texas' 30 Congressional districts. *See* TX J.S. 9a & n.3. They claimed that Texas illegally used race and ethnicity in constructing Congressional districts and

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[1]This brief uses the following abbreviations:

TX J.S. - Jurisdictional Statement and Appendix of State Appellants
J.A. - Joint Appendix
TR - Trial Transcript, volume:page
TX Ex. - State Defendants' Trial Exhibit
Lawson Ex. - Lawson Defendant-Intervenors' Trial Exhibit
LULAC Ex. - LULAC Defendant-Intervenors' Trial Exhibit
U.S. Ex. - United States' Trial Exhibit
PX - Plaintiffs' Trial Exhibit
Dep. - Deposition

failed to follow what they alleged were "traditional" districting principles. TX J.S. 10a.

The Lawson Appellants, six African-American and three white voters residing in Districts 18 and 30; the LULAC Appellants, the League of United Latin American Citizens (LULAC) of Texas and seven Hispanic voters, one of whom resides in District 29; and the United States, were permitted to intervene as defendants. *Id.* at 11a.

The court below ruled that three districts -- Texas' only two African-American opportunity districts[2] (Nos. 18 and 30) and one Hispanic opportunity district (No. 29) -- violated the Equal Protection Clause of the Fourteenth Amendment.[3] The court upheld the constitutionality of 21 other challenged districts (including new District 28), of which 18 are majority-white and three are majority-Hispanic.[4]

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[2]The terms "majority-minority district" and "opportunity district" are used interchangeably, to refer to districts that give a single minority, either African-American or Hispanic, an opportunity to elect a candidate of its choice. All of the Hispanic opportunity districts in the 1991 plan have a Hispanic majority in both population and voting-age population (VAP). District 18 has African-American population of 50.9% and VAP of 48.6%, while District 30 has African-American population of 50.0% and VAP of 47.1%. J.A. 158, 160.

[3]Districts 29 and 30 were first created after the 1990 Census. District 18 had been a minority-opportunity district since 1971 and its boundaries were modified after the 1990 Census.

[4]On September 20, 1994, the court entered an order, *nunc pro tunc* to September 2, 1994, enjoining the use of the current districts for the 1996 elections. On December 29, 1994, this Court stayed the district court's injunction. On June 29, 1995, this Court noted probable jurisdiction, thus leaving the stay in effect.

Facts

A. Major Factors Shaping Texas' 1991 Congressional Redistricting

The State of Texas was apportioned three additional Congressional seats as a result of population growth revealed by the 1990 census, increasing its total to 30. The Legislature decided to center the three new districts in three of the four counties with the largest population growth, Harris, Dallas and Bexar.[5]

The district court concluded, on the basis of largely undisputed evidence, that four types of factors combined to shape the districts at issue in this case.

1. *Incumbent protection.*

More than a year in advance, the Texas Congressional Delegation began work with the "overriding objective" of "incumbency protection," seeking "to influence the Legislature to draw districts that would maximize their chances for reelection," TX J.S. 23a, 24a. The court below noted that the Legislature "openly acknowledged" this fact: "The incumbents 'have practically drawn their own districts. Not practically, they have.'" *Id.* at 24a (quoting Senator Johnson, Chair, Subcommittee on Congressional Districts).

Traditionally, protection of incumbents has prevailed over compactness in Texas Congressional redistricting. *See* TX J.S. 15a (post-1960 creation of additional, statewide at-large seat, to maintain status of all incumbents; configuration of district running from the Houston area through rural east Texas into the southern ends of both Tarrant and Dallas

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[5]Most of that growth was attributable to increases in Hispanic and African-American population. TX J.S. 13a. Tarrant County, which is adjacent to Dallas County, was the other top growth area, *id.*, so the new Dallas district reflected the growth in this region.

Counties to protect seat of "Tiger Teague;"[6] post-1970 redistricting "notable at least in part because of the great lengths to which the state legislature went to solicit the views of incumbent congressmen"). The court below cited Ted Lyon, a former member of the Texas House and Senate involved in post-1980 and post-1990 redistricting: "[C]ompactness is not a 'traditional districting principle' in Texas. For the most part, the only traditional districting principles that have ever operated here are that incumbents are protected and each party grabs as much as it can." *Id.* at 15a n.9.[7]

In the 1991 redistricting, new technology permitted the Legislature to go further than previously "on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of incumbents." *Id.* at 55a. As the court below found, citing the construction of invalidated Districts 18 and 29:

> [M]any *incumbent protection boundaries* sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions.

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[6]One member of the Texas Legislature remarked during the 1967 floor debates "that if you were to drive down Interstate 45 from the northern border of C.D. 6 in southern Dallas and Tarrant counties to the southern border of the district in the northern suburbs of Harris County, with all the doors opened, 'you'd kill most of the voters in the district.'" J.A. 298, 302 (statement of former State Senator Mauzy).

[7]Regular shapes and respect for political subdivisions have a weak history, at best, as districting goals in Texas. *See* TX J.S. 15a n.9. Although the court below thought that prior plans were more compact than the 1991 plan, the Legislature in prior years undisputably lacked the technological capacity needed to draw districts as precisely as those adopted in 1991. Many legislators stated without contradiction that compactness has never been a strong State interest in Congressional districting. *E.g.* J.A. 391 (former State Senator Lyon); *id.* at 303 (former State Senator Mauzy).

> *For the sake of maintaining or winning seats* in the House of Representatives, Congressmen or would be Congressmen shed hostile groups and potential opponents. . . . The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts.

Id. at 55a-56a (emphasis added) (footnotes and citations omitted). In addition, a substantial part of the districts' irregularity was caused by the goal of putting incumbents' residences into their districts and not pairing incumbents in the same district. "[I]ncumbent residences repeatedly fall just along district lines." *Id.* at 24a.[8]

Significantly, incumbent protection was an overriding factor in shaping majority-white as well as minority opportunity districts. Many Texas Congressional districts were "disfigured less to favor or disadvantage one race or ethnic group than to promote the reelection of incumbents." *Id.* at 9a (footnote omitted).[9]

2. *Potential liability under the Voting Rights Act.*

The Legislature was aware as it redistricted of its vulnerability under § 2 of the Voting Rights Act if it fragmented an African-American or Hispanic population concentration that was "sufficiently large and geographically compact"[10] to constitute an effective majority in a single-member district. It was well known that two such large and

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[8] *See* TX J.S. 24a-25a (describing a half dozen such instances).

[9] *See* Addendum to this Brief (maps showing highly irregular shape of interwoven, majority-white Districts 6 (including parts of five counties) and 12, in comparison to invalidated District 30 (entirely within Dallas metroplex)).

[10] *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

geographically compact African-American populations existed, in Harris County (Houston) and in Dallas County, and that a sufficiently large and compact Hispanic population existed in Houston. The fact that a compact, majority-black district could be drawn in the Dallas area had been well publicized at least since the early 1980's, when the African-American community was deliberately divided between District 5 and District 24. Plaintiffs' main lay witness, Kent Grusendorf,[11] a Republican member of the House of Representatives, testified at trial that a compact, viable African-American district was "absolutely" possible in Dallas and that fairness required it. TR I:99-101.[12]

In Harris County, District 18 had been represented by an African American since the election of Barbara Jordan. The Hispanic population had experienced phenomenal growth and was sufficient to constitute the majority in *two* Congressional districts. TX J.S. 13a. A highly-publicized plan creating a new majority-Hispanic district, while maintaining the opportunity of African Americans to elect their candidate of choice in District 18, was proposed by State Representative Roman Martinez at the outset of the redistricting process.[13]

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[11] Plaintiffs presented only two non-plaintiff witnesses at trial, Rep. Grusendorf and their expert, Dr. Weber.

[12] Plaintiffs' expert, Dr. Weber, testified that the Owens-Pate plan for Dallas included a 45.6% African-American population district, J.A. 143, which was "reasonably compact" and would give African Americans an opportunity to elect a candidate of their choice in Dallas. TR III:115. *See also* TR II:30-31, 127-131 (testimony of Dr. Weber).

[13] TX J.S. 36a-37a. Rep. Martinez' plan did not split any precincts, TX J.S. 39a, and it maintained the Democratic nature of District 25, thus protecting white incumbent Mike Andrews, *id.* at 36a-37a. His plan could have been even more compact if District 25 had not been drawn to protect for incumbency. *E.g.* TR IV:41 (Democrats, including Hispanics, were removed to District 25). The highly compact Owens-

State Exhibit 12, produced by Christopher Sharman, the Legislature's chief technician and map drawer, TX J.S. 26a, confirms what was obvious to the Legislature. Taking no political, incumbency, geographic or factors other than race and district shape into account, Mr. Sharman produced an extremely compact version of District 18 that closely parallels the population and African-American percentage of existing District 18. Mr. Sharman testified that without political and other influences, creation of a compact version of District 18 was "fairly easy." TR IV:68. Similarly, Mr. Sharman was able, when excluding incumbency and other factors, to produce compact districts with minority population comparable to that of the current Districts 29 and 30. *Id.* at 68-69; TX Ex. 12.

3. *State legislators' ambitions.*

Closely related to incumbent protection is Texas' tradition of tailoring new or vacant districts to be favorable to aspiring members of the State Senate and House of Representatives.[14] In the 1991 plan, state legislators so assisted included white Senator Green, African-American

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Pate plan, *see* TX J.S. 49a, created districts with 53% African-American population (Dist. 18) and a 52.9% Hispanic population (Dist. 28) in Houston. J.A. 142. *See also* U.S. Ex. 1086, tape 2, at 19-20 (Texas Republican Party's studies indicated that a Hispanic opportunity district "not a dragon or a dinosaur district with unreasonable contortions" could "be created to serve a real community of interest . . . along with an expanded existing Black Congressional district"). Dr. Weber testified that a "reasonably compact" district with an African-American voting-age majority was possible in the Harris County area in 1991. TR III:113.

[14]*See* TX Ex. 62 (chart listing examples). This tradition goes back at least to 1971, when Congressional districts were drawn to promote the election of then-Senators Charles Wilson and Barbara Jordan. U.S. Ex. 1071, at 10 (Decl. of Dr. J. Morgan Kousser). *See also* J.A. 394 (Edward Martin).

Senator Johnson, Hispanic Senator Tejeda, and Hispanic Representative Martinez.

4. *Other factors.*

Several other traditional factors affected district lines and produced irregularities. The State achieved absolute population equality, with each district having 566,217 residents, a feat that caused considerable irregularity. Requests from communities to be in a particular district were accommodated where possible. The placement of industry, universities,[15] airports, government installations and other economic criteria was given great weight.[16]

B. The Interplay of These Factors

District 30. In Dallas, State Senator Eddie Bernice Johnson intended to run for Congress from the new district. She represented a compact, politically cohesive district in the State Senate that was majority-minority. Senator Johnson early in the process proposed creating a new district in

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[15]*E.g.*, TR III: 182-183 (universities and factories).

[16]For example, the State intentionally placed NASA into three different districts to enhance representation of this important state interest. J.A. 249-50. *See also id.* at 249 (District 29 deliberately includes major industries along Houston Ship Channel), 300 (location of industries considered in 1967 redistricting). Other non-racial influences include the tradition that Democrats would not seek affirmatively to interfere with existing Republican seats; the desire of Democrats to retain seats currently held by Democrats; the reluctance to redraw lines in a manner that placed two incumbents in the same district; locations of friends, supporters and family members of incumbents and aspirants; and non-racial, idiosyncratic factors.

Dallas that overlapped substantially with her Senate district, was compact, and did not split any precincts. However, as found by the district court, her proposal "drew much opposition from incumbents and was quickly abandoned." TX J.S. 31a. *See also id.* at 49a.

The irregular contours of District 30 resulted from accommodating the demands of incumbents Martin Frost and John Bryant (both white) as well as other non-racial interests. The western, irregular border of District 30 goes out to Grand Prairie because Senator Johnson had relatives[17] in the City, as well as a political base that was predominantly white. Congressman Frost also had strong political ties to Grand Prairie and after a fierce battle, they split the City in a compromise. *See, e.g.*, TX J.S. 32a. The portion of that City in District 30 is only 14.7% African American. PX 34T. Also to the west, one large arm goes out to Dallas-Fort Worth Airport, which all agreed was included for strictly non-racial reasons.[18] Irregularities in Oak Cliff and in the eastern boundary resulted from compromises with incumbents Frost and Bryant. TX J.S. 32a.

After Frost and Bryant won back territory on the east and west of District 30, the District was forced further north, because of the traditional one-person, one-vote requirement of population equality among districts. But just north of the predominantly African-American neighborhoods of South Dallas are the affluent, highly Republican, Park Cities neighborhoods, which both the incumbent and the residents wanted to remain in Republican District 3. E.B. Johnson

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[17]Plaintiffs' expert testified that including the relatives of an African-American incumbent is not a racial gerrymander, even if the relatives also are black. TR III:120.

[18]*See, e.g.* TR II:223-24, III:116 (Plaintiffs' expert concedes that extension of District 30 to airport "didn't have anything to do with race").

Dep. 130; U.S. Ex. 1038. District 30 accordingly was configured around Park Cities (creating a huge incursion by District 3 into the middle of District 30),[19] and picked up a large number of white residents,[20] including a Jewish community that was unhappy in District 3,[21] two small African-American communities, in Hamilton Park and Plano, which shared many ties with South Dallas and whose residents requested to be in District 30, and northern corridor industry such as Texas Instruments to add to the District's economic stature.

Districts 18 and 29. The court below found that factors other than race and ethnicity "influenced the boundary drawing of the Harris County districts." TX J.S. 38a.[22] The court noted that District 25, represented by white incumbent Mike Andrews, "was to be kept intact and Democratic," *id.* at 38a. A suggestion by Congressman Craig Washington that District 18 be reconfigured based on the shape of his former State legislative district "was unacceptable 'because it would have taken a large chunk out of District 25,'" *id.*

Another non-racial factor "was the desire of Senator

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[19] *See* Addendum to the Brief (map); J.A. 406 (map).

[20] The northern segment of District 30 is 24% African-American. *See* J.A. 335 (weighted average for segments 3 and 4).

[21] Lawson Ex. 22 ¶ 3; Lawson Ex. 25 ¶¶ 6-7.

[22] The district court cited the testimony of Dr. Richard Murray, a local political scientist, that "various factors influenced the Legislature in designing Districts 18 and 29: a clear commitment to improve the representational opportunities for Hispanics; the personal ambitions of certain members of the Harris County delegation; protection of incumbents; party politics; class interests; preservation of the 18th as an African-American majority seat; and keeping certain neighborhoods together." TX J.S. 47a.

Gene Green[23] to draw a Congressional district in which he could run, namely one which included as much of his Senate district as possible," *id.* State Representative Roman Martinez, who aspired to run for Congress from the same area, proposed a compact plan in which a new majority-Hispanic district would overlap substantially with his House District. *Id.* at 36a-37a. This plan was rejected because it did not do enough to accommodate Senator Green's interests. The court below found that "the borders of District 29 became increasingly distended as [Rep. Martinez] and Senator Green fought to place their state constituents within the new district." *Id.* at 66a; *see also id.* at 38a-39a.

It bears repeating that if population was taken out of a proposed district to protect incumbents, or for other non-racial reasons, new population had to be found to meet population equality requirements; it is obvious that incumbents and aspiring state legislators would want those new voters to have characteristics as similar as possible to those of the voters taken out of the district as initially proposed.

C. The Character of the Resulting Districts

Although the shape of Congressional Districts 18, 29 and 30 is more irregular than alternatives earlier suggested by minority legislators, the areas and voters included within each of the districts as finally configured share significant economic, social and political interests. To begin with, each district is located within a single metropolitan area.

The core residential areas that comprise District 18, in Houston, have remained unchanged since Barbara Jordan was elected in 1971. Lawson Ex. 16 ¶ 7. In shaping the district after the 1990 census, the Legislature added

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[23]Senator, now Congressman, Green is white; Rep. Martinez is Hispanic.

communities to which the children of existing residents of the core areas had migrated. J.A. 261 (testimony of Paul Colbert). Residents of the migration areas have ties, such as church membership and Sunday worship, with the downtown neighborhoods, and all residents in current District 18 are "part of the same media markets, including media directed toward African Americans." Lawson Ex. 13 ¶ 17 (statement of Councilwoman Sheila Jackson Lee); *see also* Lawson Ex. 12 ¶ 9 (statement of Rev. William Lawson). Non-minority neighborhoods traditionally in the District, such as Montrose, which indicated a desire to remain in it, were retained. *See* J.A. 397.

Local institutions affect the elected leaders' ties to the people and communities in District 18. For example, one witness noted: "Texas Southern University (TSU), a historically majority-black university with a substantial white student population, is located in District 18. Our Congressman, Craig Washington, our State Representative, Al Edwards, and our City Councilman, Al Calloway, all went to TSU. The late Congressman Mickey Leland also went to TSU." Lawson Ex. 18 ¶ 8 (statement of Deloyd T. Parker). Congressional nominee Sheila Jackson Lee[24] explained that because District 18 is wholly within Harris County, "[t]hese areas share the same City and County representatives" and "[i]f a District 18 constituent were to bring a local problem to my attention -- whether that individual is black, white, Hispanic, or Asian; whether that individual lives in the north, south, east or west of the district -- I would know which local representative could best address that problem, so that the representative and I could coordinate our efforts to work together on the issue." Lawson Ex. 13 ¶ 10.

Similarly, the residents of District 29 in Houston have common demographic and economic characteristics. Because

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[24]At the time of trial, Councilmember Lee was the Democratic nominee in District 18.

it is the least wealthy of Texas' Congressional districts, "there is definitely a community of interest." J.A. 477 (Martinez Dep.). The same Spanish language media serves the community throughout District 29. J.A. 396 ¶ 14. Both Districts 18 and 29 provide for ease of transportation and communication among their residents, as Dr. Paul Geisel, an expert demographer, testified: "Both of these districts are . . . historic political wards of [Houston]. . . . [D]istricts 18 and 29 are small as congressional districts. It is possible to visit all parts of either district in any direction in less than 1 hour." J.A. 289. Dr. Richard Murray, a well-respected, local political scientist, reported about Districts 18 and 29: "Stable neighborhoods and communities of interest were generally respected. . . . Stable innercity neighborhoods -- River Oaks, south Montrose, the East End, Third Ward, Acres Home -- were not divided." Lawson Ex. 26, at 17.[25]

The same characteristics are found in District 30 in Dallas County. Other Texas Congressional districts that include part of the Dallas metroplex also spread to rural counties. District 30, however, is located totally within the metropolitan area. Congresswoman Johnson testified about the small African-American neighborhoods[26] at the northern

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[25]Plaintiffs' only expert witness testified: "I know Professor Murray very well, and I respect him." TR V:75. Dr. Murray found:

> The congressional district plan adopted by the Texas Legislature created districts in Harris County [that] bring together people, including minorities not well represented in the legislative chambers even in the 1990's, who share a number of demographic and political behavioral characteristics."

Lawson Ex. 26, at 25. *See also* J.A. 395-96 ¶¶ 11-12; Lawson Ex. 18 ¶ 8.

[26]Hamilton Park is the first subdivision that would sell lots to African Americans on which to build new houses. Middle-income and upper-income African Americans migrated from South Dallas first to Hamilton Park, then to the McShan Road area and up the northern corridor to Plano. Johnson Dep. 132-133.

end of District 30: "In terms of a community interest . . . many of them are dentists and physicians who practice, have offices in [South Dallas]. They go to church in that area. They participate in social groups in the area. I live in Southwest Dallas County and many of them are my personal friends and social associates." Johnson Dep. 134. Residents of both the northern and the southern parts of District 30 are members and active supporters of local organizations such as the NAACP and Urban League. *Id.* at 142. Indeed, both African-American and white communities in North Dallas were included within District 30 because they did not feel adequately represented in their prior, predominantly Republican, Congressional districts. Johnson Dep. 132-133, 135; Lawson Ex. 22 ¶ 3; Lawson Ex. 25 ¶¶ 6-7.

As with District 18 in Houston, migration patterns were considered in determining areas to be included within District 30. TX J.S. 28a-29a (citing PX 8B (transcript in *Terrazas v. Slagle*)). In addition, communities of interests reflected by support for regional, mass transportation were considered. District 30 was designed in part based upon voting pattern data from the local referenda on Dallas Area Rapid Transit (DART) "to determine where there might be more communities of interest, where there would be support that would go beyond the color of the candidate." TX J.S. 34a (quoting Johnson Dep. 144). The DART light rail system is not regularly shaped, yet, as explained by DART Board member and former Texas House member Jesse Oliver, "the DART light rail system appears to be the skeleton of District 30 [and] DART bus routes appear to be the veins and arteries of District 30." J.A. 402; *see* J.A. 406-07 (DART maps).[27]

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[27]As Mr. Oliver stated: "The close relationship between District 30 and the DART service area is a logical one. The light rail starter system was designed to serve transit-dependent people; and those people are usually low to moderate income workers, who most often are minorities. District 30 includes this same community of people." J.A. 402 ¶ 11.

D. Representation of District Constituencies

The court below made no finding that the configuration of any of the three invalidated Congressional districts had affected the adequacy of representation afforded constituents, much less that there were any such effects along racial lines. The evidence was to the contrary.

For example, white plaintiff Barbara Thomas was "very, very favorably impressed" with nominee Sheila Jackson Lee and expected that as a Congresswoman, Lee will reach out to white voters and attempt to build racial bridges. Thomas Dep. 74, 78. One white resident of District 18 described the responsiveness of Congressman Mickey Leland and nominee Sheila Jackson Lee to *all* district residents. He testified that whites in the district "feel comfortable with that representation" and that there is widespread white support for majority-minority districts such as District 18.[28] Two white District 30 residents described how their former representatives had ignored them and how their representation has improved since they had been placed in District 30.[29]

Witnesses emphasized that these districts were not segregated,[30] but instead helped to overcome the effects of

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[28]Lawson Ex. 10 ¶ 9 (statement of David Jones). Mr. Jones referred to a recent survey conducted by Texas A&M University indicating that six of ten whites supported majority-minority districts and only 23 percent of whites were opposed. *Id.* ¶ 10.

[29]Lawson Ex. 22 ¶ 3 (statement of Marc Stanley); Lawson Ex. 25 ¶¶ 6-7 (statement of Judith E. Zimmerman). *See also* Lawson Ex. 21 ¶ 10(statement of Grady W. Smithey, Jr.).

[30]"Segregation" is an inappropriate description of the majority-minority Districts at issue here. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the word "segregate" was used to describe allegations that "[t]he essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 voters, while

segregation.[31] The only plaintiff from District 30, Pauline

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not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including *inter alia*, the right to vote in municipal elections." Justice Frankfurter, known for his precision in the use of language, said that if those allegations remained uncontradicted or unqualified after trial, "the conclusion would be irresistible . . . that the legislation is solely concerned with *segregating* . . . voters," *id.* at 341 (emphasis added).

Here, in contrast, District 18, 29 and 30 are the most integrated districts in Texas' 1991 districting plan, with all of the State's other 27 districts having a higher percentage of a single race or ethnic group than any of these three districts. In voting age population, District 18 is 47.1% black, 35.2% white and 13.7% Hispanic; District 29 is 55.4% Hispanic, 9.8% black and 33.4% white; District 30 is 47.1% black, 36.1% white and 15.1% Hispanic. As the results in District 29 indicate, there is no bar to white candidates running or being elected. Texas has seven Congressional districts that are more than 80% white. It is not accurate to describe an integrated, minority opportunity district as "segregated," especially when heavily white districts are not labelled that way.

The court below also used the term "segregate" in an unusual sense, to refer both to including minority voters into *integrated* minority opportunity districts *and* to the placement of other minority voters *into majority-white districts*. *E.g.* TX J.S. 68a. Plaintiffs' expert was similarly expansive in his definition of segregation. Dr. Weber first stated that District 30 was not "a strong indication of segregation," because many African Americans in the close vicinity were excluded. TR III:110. He later changed his testimony and said that District 30 was segregated, but he was unable to say whether blacks were segregated *into* (or out of) the District and he testified that whites were segregated *into* the District. TR III:139.

[31]White resident Judith Zimmerman explained: "Far from segregating voters, the creation of a majority-minority district in Dallas has provided an opportunity for a long overdue joining of historically divided forces. Dallas is extremely polarized along racial lines, and this district is a wonderful tool to help us pull together." Lawson Ex. 25 ¶ 7. Dallas businessman Albert Black stated: "I grew up in a segregated neighborhood. . . . I do not understand how anyone could think a district that brings together an African-American businessman from South Dallas

Orcutt, described the district forcefully: "*It is integrated. Of course it is, and you know it.*" Orcutt Dep. 110-11 (emphasis added)."

Plaintiffs' Claims

The nature of the claims asserted by plaintiffs in this case are fundamentally different from other post-*Shaw v. Reno* lawsuits, such as those involving Georgia and Louisiana. Plaintiffs in this case do not seek a remedy that will make these three majority-minority districts majority white. Plaintiffs here do not contend that majority-non-white districts would not exist in Dallas or Harris County except as a result of race-conscious redistricting. To the contrary, plaintiffs readily conceded that what they regard as "color-blind" redistricting would result in African-American opportunity districts in both counties, and in a predominantly Hispanic district in Harris County. Plaintiffs' central trial court exhibit was their alternative districting plan, deliberately drawn by plaintiffs' expert without consideration of race. Even under such a plan, plaintiffs acknowledged that Districts 18, 29 and 30 would be majority-non-white. This case thus presents the circumstance described in *Shaw*, 113 S. Ct. at 2828, in which recognition of existing communities would result in non-white districts.

The gravamen of plaintiffs' claim concerns not *whether* Districts 18, 29 and 30 should be majority-non-white, but only what the particular contours of these districts should be. Plaintiffs contend that under a race-neutral districting process, the minority population should actually have been higher in District 18 and about the same in District 30. Only in District 29, which is currently represented by a white incumbent, do plaintiffs advocate a

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(like me) and an Anglo businessman from North Dallas (like Jerry Johnson) to further economic development in the entire Dallas area could be considered segregative." Lawson Ex. 1, at 16.

substantial increase in the proportion of whites.[32]

The District Court's Ruling

The court below invalidated Districts 18, 29 and 30, while upholding the constitutionality of 18 majority-white and three majority-Hispanic districts.[33] It subjected Districts 18, 29 and 30 to "strict scrutiny" because it said that they were "racial gerrymander[s]," TX J.S. 69a, defined as districts intentionally created to be majority-minority, which did not comport with "traditional" districting criteria, which the court held must be "objective" and "ideal." *Id.* The court specifically excluded protection of incumbents from among "traditional districting" factors, because it is not an

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[32]Plaintiffs advocated combined-minority districts, proposing to put more Hispanics into the African-American opportunity districts, and more African-Americans into the Hispanic districts, a legal argument discussed in note 80, below. The following chart shows the white and minority population of Districts 18, 29 and 30 in the current plan and in plaintiffs' proposed alternative plan:

	Black and Hispanic	White
District 18		
Current Plan	370,913 (65.5%)	177,036 (31.3%)
Plaintiffs' Plan	411,915 (72.7%)	142,668 (25.2%)
District 29		
State's Plan	397,459 (70.2%)	157,461 (31.4%)
Plaintiffs' Plan	311,096 (54.9%)	233,660 (41.3%)
District 30		
State's Plan	375,233 (66.3%)	177,661 (31.4%)
Plaintiffs' Plan	364,467 (64.4%)	191,519 (33.8%)

The net overall effect of plaintiffs' plan for these three districts of more than 1.5 million residents is to increase white population by 55,689, mostly in District 29, which so far has elected the candidate of choice of white, and not Hispanic, voters, TR II:18, J.A. 181 ¶ 38.

[33]Plaintiffs dropped their challenge to the remaining six districts, including three majority-Hispanic districts.

"ideal" criterion, *id.* at 56a & n.43, and because "many of the voters being fought over [by the incumbents] were African American," *id.* at 64a.

Applying strict scrutiny, the court did not address whether Texas had a compelling justification for creating minority opportunity districts in the Houston and Dallas areas because it concluded that the districts were not "narrowly tailored." *Id.* at 69a-74a. The court held that in creating majority-minority districts, the State must maximize regularity of district shape,[34] even though no such rule exists for majority-white districts. The court found "dispositive" the "fact that alternative plans for Districts 18, 29 and 30 were all much more geographically and otherwise logical," *id.* at 73a.

SUMMARY OF ARGUMENT

Shaw v. Reno, 113 S. Ct. 2816 (1993), and *Miller v. Johnson*, 115 S. Ct. 2475 (1995), hold that when "race predominates in the redistricting process," *id.* at 2488, a plaintiff who has standing may require a State to justify its districting plan by demonstrating that there was a compelling State interest for taking race into account and that the plan was narrowly tailored to achieve the compelling goal. On the other hand, these cases reaffirm that, absent proof that racial considerations predominated the districting process, there is no colorable claim of a Fourteenth Amendment violation even though a particular electoral district has a majority-minority population. *See Miller*, 115 S. Ct. at 2490.

The factual findings below -- if not the lower court's

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[34]"Because a *Shaw* claim embraces the district's appearance as well as its racial construction, narrow tailoring must take both these elements into account. That is, to be narrowly tailored, *a district must have the least possible amount of irregularity in shape*, making allowances for traditional districting criteria." TX J.S. 72a (footnote omitted and emphasis added).

sweeping characterizations of the case -- and abundant evidence in the record demonstrate that race was *not* "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" Districts 18, 29 and 30. *Miller*, 115 S. Ct. at 2481. Differences between the districts as enacted and those which plaintiffs conceded would be appropriate, *see* TX J.S. 48a, were attributable to reasons that have nothing to do with racial motive. Because this case involves the interplay of numerous *political* factors (primarily Texas' tradition of partisanship and incumbent protection) in the districting process, and the Legislature's simultaneous awareness of the State's racial demography, of its obligations under § 5 of the Voting Rights Act, and of the need to avoid fragmentation of concentrations of minority voters that would subject it to potential liability under § 2 of the Act, the court below erred in subjecting the challenged districts to "strict scrutiny" as though race predominated.

The Court below also erred in its belief that the only redistricting principles which could be considered were those listed in *Shaw*, 113 S. Ct. at 2827. It specifically rejected incumbent protection, TX J.S. 56a, as a traditional redistricting criterion as well as other non-racial considerations that actually influenced the 1991 Texas redistricting. Moreover, the three districts invalidated below have contiguity in the same way as other challenged districts found legal by the trial court, and they likewise reflect as much respect for political subdivisions as those other districts.

Even if the Court were to determine that "strict scrutiny" is the appropriate analytic standard, the judgment below must still be reversed. The State had an extremely strong basis in evidence for concluding that a compelling interest supported the creation of these minority opportunity districts in light of the population concentrations, polarized voting, the history of discrimination and, with respect to

District 18, the requirement of non-retrogression. The court below erred in holding that a majority-minority district "must have the least possible amount of irregularity of shape, making allowances for traditional districting criteria," TX J.S. 72a, which did not include incumbency protection. This is a clear misreading of this Court's language in *Shaw* stating that there would be a violation of the Fourteenth Amendment if "a state concentrated dispersed minority population in a single district by disregarding traditional principles such as compactness, contiguity, and respect for political subdivisions," 113 S. Ct. at 2827. There is nothing in the *Shaw* opinion which says or indicates that the three principles mentioned are exclusive. And the fact that "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion," TX J.S. 56a, does not mean that a court in a democratic society can shut its eyes to such political reality.

Plaintiffs' complaint should have been dismissed because they failed to introduce evidence sufficient to demonstrate their standing.[35] Although they are residents of Districts 18, 29 and 30, none of the plaintiffs presented evidence that they suffered the harms discussed in *Shaw*, 113 S. Ct. at 2826.

ARGUMENT

I. *THE 1991 PLAN, INCLUDING DISTRICTS 18, 29 AND 30, SHOULD HAVE BEEN SUSTAINED WITHOUT STRICT SCRUTINY*

This is not a case like *Miller v. Johnson*, in which a legislature enacted several redistricting plans based on multiple criteria -- each of which was criticized for not including enough minority districts -- and thereafter adopted a plan in which all factors "that could realistically be

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[35] *See United States v. Hays*, 115 S. Ct. 2431, 2435 (1995)(dismissal proper if evidence sufficient to support standing not adduced at trial).

subordinated to racial tinkering in fact suffered that fate," 115 S. Ct. at 2475. Here, the Legislature started with an undisputed awareness of plans that would produce compact, contiguous, minority-opportunity Congressional districts in urban areas where large concentrations of minority voters resided. The legislature ultimately adopted a plan that included minority opportunity districts in those metropolitan areas, but the districts' shape -- while remaining contiguous, having as much respect for political subdivisions as other districts created under the plan, and including equal population -- became somewhat less regular and compact solely as a result of complex political compromising designed to protect incumbents, achieve partisan advantage and accomplish other non-racial goals.

Because of this very different fact pattern, the prerequisite determination requiring the application of "strict scrutiny" announced in *Miller*: that "race predominate[d] in the redistricting process," 115 S. Ct. at 2488, could not be justifiably made in this case; and for this reason, the court below should have sustained the legislative districts without undertaking a "strict scrutiny" analysis.

A. Race Did Not Predominate Either In The State Of Texas' Decision To Create Majority-Minority Districts Or In The Ultimate Configuration Of Those Districts.

Miller held that the *predominance of race* in the districting process, not district shape, is the touchstone for application of "strict scrutiny." 115 S. Ct. at 2490.

> To make this showing ["that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"], a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity,

> respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

115 S. Ct. at 2481. The Court also recognized: "[A] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. '[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.'" *Id.* at 2490 (quoting *Shaw*, 113 S. Ct. 2816, 2826).[36]

Further insight into the applicable standards is provided by the Court's action on the same day that *Miller* was announced, summarily affirming the lower federal court ruling that upheld California's Congressional and State legislative districting plans, *DeWitt v. Wilson*, 115 S. Ct. 2637 (1995). The creation of majority-minority districts was a strong motivating factor in the *DeWitt* districting plan, which was proposed by a panel of Masters and adopted by the California Supreme Court. *See Wilson v. Eu*, 4 Cal. Rptr. 2d 379 (1992).[37] As found by the Supreme Court of California,

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[36]*Miller* directed courts "to exercise extraordinary caution" and recognized "the intrusive potential of judicial intervention into the legislative realm." 115 S. Ct. at 2488. Even to invoke strict scrutiny, plaintiffs must show that race "predominated" in the districting process and other considerations were "subordinated," *id.* at 2488. Justice O'Connor's concurring opinion explained: "[t]he threshold standard the Court adopts . . . [is] a demanding one" and "[a]pplication of the Court's standard does not throw into doubt the vast majority of the Nation's 435 Congressional districts," *id.* at 2497.

[37]The Masters "devoted intense efforts to comply with the federal Voting Rights Act." 4 Cal. Rptr. 2d at 383. They explicitly gave "federal Voting Rights Act requirements . . . the highest possible consideration," *id.* at 397. Because the Masters had no knowledge of whether the second and third preconditions of *Thornburg v. Gingles*, 478 U.S. at 50

the Masters engaged in "successful efforts to *maximize* the actual and potential voting strength of all geographically compact minority groups of significant voting age population," *id.* at 393 (emphasis added). Despite the Masters' deliberate creation of minority opportunity districts in all areas of the State where the minority population was sufficiently large and geographically compact to constitute a majority in a single-member district, the three-judge court found that strict scrutiny was not required because "the Masters' Report sought to balance the many traditional redistricting principles, *including the requirements of the Voting Rights Act*," 856 F. Supp. 1409, 1413 (E.D. Calif. 1992) (emphasis added).[38]

When these principles are applied to the facts found by the district court, it is clear that race was not "the predominant" motive within the meaning of *Miller* and, hence, that strict scrutiny of the Texas districting plan was not required. Like the Masters in *DeWitt*, Texas created majority-Hispanic or majority-African-American districts *only* where either the Hispanic or African-American population was sufficiently large and compact to satisfy the first

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(1986), were satisfied in any regions of California, they chose to minimize the risk of a successful § 2 claim by creating a majority-minority districts wherever the first *Gingles* prong was met. 4 Cal. Rptr. 2d 379, 383, 397, 399 (Masters did not have evidence of voting patterns and thus chose to "draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings."). Indeed, the Masters went further and where a compact minority population was not large enough to constitute a majority in a district, the panel nonetheless kept the minority population together in an effort to promote minority influence. *Id.* at 383-384.

[38]Although the court alternatively found that the plan would survive strict scrutiny, 856 F. Supp. at 1414, there was no evidence of racially polarized voting, thus suggesting that this Court's summary affirmance was based on the conclusion that strict scrutiny was not required.

precondition of *Gingles*.[39] The Legislature decided to make Districts 18, 29 and 30 majority-minority only after it was clear that such majority-minority districts could be created *in conformity with compactness and other "ideal" criteria*. Compactness was not subordinated to race or ethnicity in determining the number of majority-minority districts. The State did not maximize the number of majority-minority districts.[40] In fact, it instead rejected proposals that would have created additional minority opportunity districts.[41]

The Masters in *DeWitt* identified reasonably compact majority-minority districts and then built the rest of the State's plan around those districts. If Texas had adopted the idealized, most compact versions of Districts 18, 29 and 30, strict scrutiny would not be triggered. Instead of rigidly adopting and building around the idealized versions, Texas in the final borders of its minority opportunity districts accommodated non-racial goals, such as incumbent protection, State legislator aspirations, placement of non-population areas like airports and industry, placement of incumbents' residents, funding sources and friends, and requests from voters of all race and ethnic groups and

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[39]478 U.S. at 50. The Legislature was thoroughly advised about the standards applied under § 2 of the Voting Rights Act through the "gray books" prepared by and presentations given by knowledgeable Texas Legislative Counsel attorneys. *See* TX J.S. 17a.

[40]*E.g.*, TR III:21 (plaintiffs' expert, Dr. Weber, testified: "Texas 1991 redistricting plan is not designed to maximize black voting strength").

[41]The decisive role of compactness in the decisions when to create majority-minority districts and the absence of a "race for its own sake" motive is demonstrated by the State's rejection of proposals for additional majority-minority districts. The Legislature rejected proposals for majority-minority districts that would have joined together dispersed minority populations with no apparent communities of interest. For example, State Representative Jerald Larry proposed a third majority-African-American district that would have traversed parts of 15 counties. J.A. 305-06; Lawson Ex. 11 ¶ 6. *See also* J.A. 253, 397.

religions. Such accomodations are characteristic of the democratic society in which we live.

The evidence is overwhelming that the predominant, overriding *motive* in moving from regularly shaped to irregularly shaped versions of the opportunity districts was *not race, but incumbent protection*. As plaintiffs' main lay witness, Representative Grusendorf, conceded, "the odd configuration of District 30 was the result of protecting Frost and Bryant." TX J.S. 32a.

Adjusting the borders of a compact African-American or Hispanic district to better serve non-racial goals does not convert an appropriate and "wholly legitimate" consideration of race, *Miller*, 115 S. Ct. at 2490, 2500 (*quoting Shaw*, 113 S. Ct. at 2826), into "the predominant" use of race to determine the ultimate shape of the district. Rather than increasing the degree of racial motive, Texas' choice of irregular over regularly shaped versions of the minority opportunity districts decreased the role of race and ethnicity, by bringing additional influences into the decision.

B. Districts 18, 29 And 30 Encompass Communities That Have Actual Shared Interests

In describing the characteristics of districting plans that need not be tested under a strict scrutiny standard, the Court in *Miller* distinguished legislative recognition of "communities that have a particular racial makeup [as well as] . . . some common thread of relevant interests" from a legislative assumption that persons of the same race will prefer the same candidates at the polls, *id.* at 2490. The extensive record in this case amply demonstrates that Texas Districts 18, 29 and 30 all bring together "members of a racial group [who] live together in one community," *id.*, and who have deep, common bonds.

The extensive evidence of voting patterns presented by experts for both the plaintiffs and the State leaves no

doubt that the State was not relying on the unproven assumption of political cohesion among African Americans in Houston and Dallas and among Hispanics in Houston. The experts agreed and the evidence was overwhelming that African Americans in the Houston area *in fact* support the same political candidates, that African Americans in the Dallas area *in fact* vote cohesively as a group and that Hispanics in the Houston area *in fact* vote cohesively with each other, but not with African Americans. (This data is discussed in more detail in Point II. A.2.b., below.) Because, as described above (*see supra* pp. 11-14), these districts were designed to recognize known communities of common interests, and were not based on stereotypes, they are not subject to strict scrutiny.

C. The Final Configuration Of The Districts Resulted From A Constitutionally Permitted Political Gerrymander, Not From An Improper Racial Gerrymander

The essence of this case is political "gerrymandering," not racial "gerrymandering." The decision to protect all sitting incumbents and to make the three new districts Democratic had strong partisan implications. In a State where roughly half the votes go to Republicans, the 1991 districting plan designed 73% (22 of 30) of the Congressional districts to elect Democrats.[42] This feat

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[42]J.A. 346. *See also* U.S. Ex. 1000 (partisan index for Texas 1991 Congressional districts). The Democratic districts had majorities of Democratic voters of at least 54.8%, while the Republican districts had Republican majorities of at least 60.6%. *Id.* One of the districts (No. 23) drawn with a Democratic majority in 1991 elected a Republican in 1992, probably because the incumbent was under investigation and subsequently was indicted. The Republicans captured additional seats in 1994, but the 1994 losses were probably facilitated by the partisan gerrymander, *i.e.*, because the Legislature had spread Democratic voters thinly in the effort to maximize the number of Democratic-controlled districts, small shifts in voter choice toward the Republican direction

naturally required creative line drawing, but the effort was a far-flung search for Democrats, not minorities.

The fact that Texas had engaged in a political, and not racial, gerrymander was well known at the time. A *Bandemer*-type[43] lawsuit was filed by Republicans even before the final plan was adopted.[44] Republicans (except incumbents happy with their high Republican percentages) uniformly denounced the plan as Democratic gerrymandering.[45] No one claimed racial gerrymandering in favor of African-American or Hispanic voters. Instead, the opposite claim was made, that African-American and Hispanic voters were disadvantaged in the quest to protect all Democratic incumbents (most of whom happened to be white).[46]

The transformation of Rep. Grusendorf, plaintiffs' main trial witness, is illustrative. In 1991, Rep. Grusendorf found the district lines "very logical and rational, . . . dissecting communities very creatively in order to pack Republicans and maximize Democratic representation." He stated: "*This plan was drawn with only one thing in mind, and that is to protect Democratic incumbents, period.*" J.A. 376, 380 (Texas House Floor Debate, Aug. 21, 1991) (emphasis added). Only after claims of partisan gerrymandering lost in federal court[47] did Rep. Grusendorf

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resulted in the loss of seats.

[43]*Davis v. Bandemer*, 478 U.S. 109 (1986).

[44]*See Terrazas v. Slagle*, 821 F. Supp. 1162, 1172 (W.D. Tex. 1993).

[45]*E.g.*, J.A. 346, 351.

[46]TX J.S. 18a; U.S. Ex. 1005 (Republican claims of minority vote dilution).

[47]*Terrazas, supra note* 44.

discover the racial gerrymandering assertion, while still complaining more about the partisan nature of the plan.[48]

It is no mere coincidence that all plaintiffs in this case are Republicans.[49] Plaintiffs presented at trial a plan that kept the same number of majority-minority districts, but dramatically altered the Democrat-Republican balance, from 22/8 to 15/15. TR IV:175-177. Plaintiffs' expert admitted that plaintiffs' alternative plan sought "to provide a fairer distribution of the seats based upon what we know about *partisan* divisions in the State." TR V:24 (emphasis added).

With large, multi-ethnic, minority populations, it was inevitable that minority voters, like all other voters, would get caught up in the partisan engineering. The State's constitutionally legitimate effort not to fragment large, compact minority populations was carried out in the overarching context of its political gerrymander, with the result that the boundaries of both minority and non-minority districts, not only in Houston and Dallas, but throughout the State, were made more irregular.

The irregularity was exacerbated where the State was inserting new Democratic districts into metropolitan areas with a "shortfall" of Democratic voters.[50] But majority-minority districts were treated no differently than majority-white districts in the distortion of their shapes to produce Democratic majorities in all Democratic districts.

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[48]TR I:99 ("the problem in congressional districting was not in the Black district, but . . . the feeding frenzy of white Democrats"), 100-101 ("fairness" and Voting Rights Act "required majority-minority districts here"), 116 (Congressman Frost needed "Black voters to get re-elected" "[b]ecause they vote Democratic").

[49]*See* J.A. 390 ¶¶ 16, 17.

[50]*See* U.S. Ex. 1041 ("there just aren't alot of spare Democratic voters in and around Dallas").

Another way minority voters were caught up in the partisan gerrymandering is the happenstance that in Texas African-American, and to a lesser extent Hispanic, voters are Democrats. In the quest to find Democrats, African Americans and Hispanics were desirable, but so were white Democrats, as demonstrated by the intense fight between Eddie Bernice Johnson and Martin Frost over white voters in Grand Prairie. Such consciousness of race and ethnicity in the quest for Democrats is not constitutionally suspect, as discussed in Point D.2., below. Unless the Court concludes that *Davis v. Bandemer*,[51] should be overruled, a result that appellants do not advocate, there is no constitutional basis for new, anti-partisan gerrymandering rules, applicable *only* to majority-minority districts.

D. The Lower Court's Decision To Subject Districts 18, 29 And 30 To Strict Scrutiny Is Based On Serious Errors Of Law

1. *The District Court erred in rejecting incumbent protection as a "traditional" districting criterion.*

Miller and *DeWitt* establish that strict scrutiny applies only when race was "the predominant" motive for a districting plan and "race for its own sake . . . was the legislature's dominant and controlling rationale." 115 S. Ct. at 2488, 2486. It follows that where majority-minority districts can be created without displacing the State's other districting criteria, as in *DeWitt*, race is not "predominant." It also follows that where any conflicts between the goal of creating majority-minority districts and other districting

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[51] *See also Gaffney v. Cummings*, 412 U.S. 735, 752, n.18 (1973) (partisan gerrymandering does not constitute a Fourteenth Amendment violation, even when "the shapes of the districts would not have been so 'indecent' had the Board not attempted to 'wiggle and joggle' border lines to pockets of each party's strength").

objectives resulted in compromises, those other districting factors were not "subordinated," nor was race "the dominant and controlling" factor, *id.*

The centrality of incumbent protection, as described in the district court's opinion, makes clear that race and ethnicity could not have been, unless one misuses the adjective, the "predominant"[52] factor motivating the Legislature's 1991 action. The district court's opinion describes numerous instances in which the goal of creating majority-minority districts conflicted with the goal of incumbent protection, and the minority opportunity goal did not predominate.

For example, although the district court characterized Senator Johnson as motivated solely by a desire to create a majority-African-American district, the court recognized that the plan she initially proposed "drew much opposition from incumbents and was quickly abandoned." TX J.S. 31a n.22. Rather than constituting evidence that the Legislature's final plan for District 30 is an unconstitutional racial gerrymander, this finding is fatal to the claim that race and ethnicity predominated. In contrast to Senator Johnson's *proposal*, the *State's* plan came about only after intense political battles were fought, block by block, voter by voter, and the interests of minority voters were compromised to accommodate incumbent Congressmen.[53]

The district court did not deny that incumbent protection predominated, but instead reasoned: "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion." TX J.S. 56a. Excising incumbent

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[52]The definition of predominant is: "holding an ascendancy" or "having superior strength, influence, authority or position." Webster's Third New International Dictionary 1786 (1981).

[53]*See* J.A. 388 (Senator Johnson had to accommodate incumbents to get plan passed by Legislature).

protection simply because it is not explicitly listed in *Shaw* is an error of law. *Miller* indicates that "traditional race-neutral districting principles . . . includ[e] *but [are] not limited to*" compactness and other factors on the illustrative list. 115 S. Ct. at 2488 (emphasis added). *Miller* explicitly held that where "these *or other race-neutral considerations*" are the basis for redistricting legislation and are not subordinated to race and ethnicity, strict scrutiny is not required. *Id.* (emphasis added). Thus, the district court misconstrued the law as expressed by this Court in *Shaw* and *Miller*.

There are sound policy reasons, among them federalism, for this Court's failure to include an exclusive list of non-racial districting criteria in its opinions. In *Miller*, the Court emphasized that the Constitution demands deference to a State's *own* definition of its districting interests.[54] The district court disregarded this Court's recognition of incumbent protection and political consequences as valid districting factors,[55] because it said that Texas was too

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[54]115 S. Ct. at 2487 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests"; "[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions"; "reapportionment is primarily the duty and responsibility of the State").

[55]The Court has consistently emphasized that protection of incumbents is a legitimate State districting principle which, in the exercise of State discretion, may be given a higher priority than compactness. *White v. Weiser*, 412 U.S. 783, 791 (1973) (State could legitimately seek the benefits of "maintaining existing relationships between incumbent congressmen and their constituents" and preserving congressional seniority); *id.* at 794 n.15; *Karcher v. Daggett*, 462 U.S. 725 (1983)(avoidance of contests between congressional incumbents and "preserving the cores of prior districts" are legitimate State districting goals). The Court also has stressed: "Politics and political considerations are inseparable from districting and apportionment . . . The reality is that

aggressive in pursuit of these goals. TX J.S. 54a. But nothing in the Constitution or precedent suggests that a legitimate State goal is transformed into an illegitimate goal, simply because the State aggressively pursues it. Rather, the aggressiveness with which the State protected its incumbents merely reflects the high value Texas placed on this goal and the dominance of this influence in district construction.

The district court similarly concluded that only "objective districting factors" or "ideal districting criteria" may rebut a *Shaw v. Reno* claim. *Id.* at 53a, 56a. *Miller* indicates that this also was error because it would elevate a federal court's policy choices above a State's and is unrelated to the central inquiry into predominant legislative motive. The constitutional question is whether the State gave weight to its own self-defined interests and did not subordinate those interests to a racial motive.

2. *The district court erred as a matter of law in refusing to recognize the goal of incumbent protection as a non-racial influence on district shape.*

The second reason given by the court below for rejection of incumbent protection is that "racial gerrymandering was an essential part of incumbency protection," *id.* at 65a. The court reached this conclusion because "many of the voters being fought over were African American"[56] and some "African-American voters were deliberately fenced out of District 30 and placed in other

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districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. at 753.

[56]The court's language necessarily recognizes that *many of the voters fought over were white* and others were Hispanic. The common characteristic of all these voters was not race, but Democratic party affiliation.

districts" to protect white incumbents. *Id.* at 65a, 66a.[57]

The district court's conclusion that incumbent protection was part of the "essence" of the racial gerrymander is based not on the placement of minority voters into majority-minority districts, but on the placement of minority voters into majority-white districts, an integrative, not segregative action. This conclusion is legal error because it improperly treats as racial *motive* mere race-consciousness and partisan *correlation* with race.

The court below recognized that white Democrats wanted minority voters not because of "race for its own sake," *Miller*, 115 S. Ct. at 2486, but because they voted Democratic. *See, e.g.*, TX J.S. 32a ("*Frost and Bryant were not concerned about the race of these voters.* They just wanted to hold onto enough Democrats to assure re-election.") (quoting testimony of Ted Lyon, former member of Texas House and Senate, J.A. 388).[58] Yet, ultimately the

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[57]The court made the same finding as to Harris County: "Incumbent Democrats were fencing minorities into their districts or into the new majority-minority districts, while those same minorities were effectively being removed from Republican incumbents' districts." *Id.* at 68a.

[58]The district court found "[q]uite telling" a letter from then-Senator Johnson to the Department of Justice, "explain[ing] why African-American voters were so attractive to incumbents fighting over district boundaries," TX J.S. 33a. The letter states:

> [A]pproximately 97% of the total votes cast by Blacks in the Dallas/Fort Worth metroplex area are cast in the Democratic primary. *Because of the consistency of this voting pattern*, Democratic incumbents generally seek to include as many Blacks as possible into their respective districts.

Id. (quoting PX 6E6) (emphasis added). Plaintiffs' main witness, Rep. Grusendorf, testified that the reason Frost wanted black voters in his district was *because* they vote Democratic. TR I:124 (emphasis added), and Dr. Weber testified that certain white Democrats desired African-American voters because "those would be reliable Democratic voters," TR III:125. Other legislative history confirms this partisan motive. Rep.

court rejected the State's argument that incumbent protection was a *partisan* matter, reasoning:

> As it happens, however, many of the voters being fought over were African-American. The State cannot have it both ways. It cannot say that African-American voters are African-American when they are moved into District 30, but they are merely "Democratic" when they are deliberately placed in a contiguous district for the purpose of bolstering the re-election chances of other Democrats.

TX J.S. 64a (footnote omitted).

Miller explicitly held that consciousness of the race of voters in constructing Congressional districts does not violate the Equal Protection Clause, explaining: "Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates . . . . '[D]iscriminatory purpose'. . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part '*because of*,' not merely 'in spite of,' its [racial] effects." 115 S. Ct. at 2488 (emphasis added)(quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)). When stripped of rhetoric, the district court's view that race was an "essential part" of incumbent protection is revealed to be nothing more than incidental consciousness of the race and ethnicity of persons who vote for the Democratic party. Such incidental consciousness of race and ethnicity is not unconstitutional under *Miller* and therefore is not a reason for ignoring the race-neutral *goal* of incumbent protection as a predominant,

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Hill objected to the "snaking out" of District 30, noting that "certain black precincts that were contiguous to the central and core portion of the City of Dallas" were not included in District 30 but "[w]here they are included is in Democratic Congressman Martin Frost's district, and obviously they are there . . . *because those are democrat voters*." PX 24, 28-31 (emphasis added).

traditional, influence on the construction of Districts 18, 29 and 30. The *goal* of incumbent protection in Texas was race-neutral, applied to all incumbents and aspiring legislators, regardless of race and ethnicity. As such, it deserved recognition under *Miller* as a "traditional race-neutral districting principl[e]", 115 S. Ct. at 2481, that was not subordinated to race, and accordingly, Districts 18, 29 and 30 should not have been subjected to strict scrutiny.

3. *The district court applied the wrong test and erred in ignoring the irregular shapes of Texas' majority-white Congressional districts.*

The court below articulated its threshold test for strict scrutiny: "the plaintiffs' burden of production extends solely to the race-consciousness of the districts combined with the disregard of traditional districting criteria." TX J.S. 70a. It held that once plaintiffs meet that burden of producing evidence that would support a claim of racial gerrymander, the State's only defense is to meet the requirements of "strict scrutiny" (compelling State interest and narrow tailoring). *Id.* at 60a. Instead of carefully analyzing all of the motives and influences that resulted in Districts 18, 29 and 30, the arbitrary test adopted by the district court, and the erroneous limit on the non-racial districting criteria that the State may legitimately take into account, eviscerated the opportunity afforded the State by this Court's decision in *Miller* to defeat such a claim by showing that non-racial considerations were not "subordinated to race" in the districting process, 115 S. Ct. at 2481.

Under the district court's test, districts are subjected to strict scrutiny regardless of whether racial considerations predominated, if race played any role in creation of a majority-minority district and the shape of that district is irregular. The court explained its reasoning: "we disagree strongly that the misshapen boundaries of a racially

constructed district are merely prima facie evidence of a constitutional violation and not part of its essence." TX J.S. 53a n. 40.

Miller explicitly rejects this reasoning, holding that shape is *not* part of the "essence" of the Equal Protection claim. Instead, under *Miller*, a district's *shape*

> is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

115 S. Ct. at 2486. The court below erred in relying on shape as part of the "essence" of the claim.

The court also erred in ignoring the highly irregular shapes of majority-white Congressional districts in reaching its conclusion that Districts 18, 29 and 30 were "unexplainable in terms other than race," TX J.S. 65a, 69a. It focused its analysis upon only these minority opportunity districts despite its description of the overall 1991 plan as "a crazy-quilt of districts that more closely resembles a Modigliani painting than the work of public-spirited representatives," *id.* at 8a. Although plaintiffs challenged as "bizarre" 20 of the State's 30 districts,[59] the district court upheld the constitutionality of 18 majority-white districts and three majority-minority districts. It follows that when both majority-minority and majority-white districts across a State exhibit similar irregularity of configuration, shape provides

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[59]The lower court found many Texas majority-white districts "disfigured" and "equally 'untraditional'" as the districts it invalidated. TX J.S. 9a, 65a. The plaintiffs identified 23 of Texas' current Congressional districts as equally or more bizarre than Districts 18, 29 or 30. Thomas Dep. 49-52; Vera Dep. 36-44; Blum Dep. 65-73; Chen Dep. 65-77; Powers Dep. 55-58.

no probative indication of racial motive.

By ignoring the highly irregular, majority-white districts, the district court subjected efforts to recognize minority communities of interest to a higher constitutional standard than efforts to recognize other communities of interest. This is contrary to Justice O'Connor's conclusion, concurring in *Miller*, that "certainly the [appropriate constitutional] standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups." 115 S. Ct. at 2497 (emphasis in original). Although Justice O'Connor's reference was to districts drawn to recognize ethnic communities of interest, it is equally applicable to Texas' efforts to recognize partisan communities of interest in constructing its districts. Redistricting always involves "competing claims of political, religious, ethnic, *racial*, occupational, and socioeconomic groups," *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring)(emphasis added), and the Fourteenth Amendment cannot possibly mean that African Americans and Hispanics seeking a district that recognizes their interests are held to a higher standard than white Democrats or Republicans.

4. *The district court erred in finding a "racial gerrymander" from a combination of awareness of racial demography, valid consideration of race in the districting process and the existence of correlations between districting factors and race.*

The district court's ultimate legal conclusion of racial gerrymandering is fatally flawed because it is based on racial correlations and awareness, not predominant motive. The court treated as improper: a legislature's awareness of racial demography (for example, because its redistricting software displayed such information); its legitimate consideration of race for valid reasons (such as the need to avoid retrogression and fragmentation); and the existence of a

correlation between race and a uniformly applied criterion in making districting decisions (such as partisan voting patterns or the racial makeup of a minority incumbent's or aspiring incumbent's supporters). The court incorrectly treated the plan that emerged from the interplay of these and other factors in the Legislature's deliberations as deliberate *racial gerrymandering*.

Without more, none of these phenomena individually or in combination establishes that the Legislature acted from predominant racial motives. Even if racial and ethnic considerations played a role in the decisions to create majority-minority districts in areas of the State where the *Gingles* prerequisites existed, they were not the "predominant" factors in the process. For, as discussed in Point I.A. above, determinations about the number and location of majority-minority districts incorporated consideration of compactness and similar districting principles, so that they do not reveal race to have been a dominant, overriding motive.[60] All of the other actions

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[60]Many of the facts cited by the lower court as indicative of a racial gerrymander are simply manifestations of the decision, made in the same manner as that in *DeWitt*, to create majority-minority districts. For example, the court found fault in the fact that Senator Johnson sought a "safe" African-American district. TX J.S. 9a. Yet "safe" is a commonplace term used to describe a *remedial* district that provides a compact, cohesive minority community with an equal opportunity to elect candidates of its choice. *E.g. African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1347 n.4 (8th Cir. 1995)(defining "safe" and explaining its history); *Monroe v. City of Woodville, Miss*, 819 F.2d 507, 510- 511 & n.1 (5th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988)(after review of the "usage of the term in the relevant jurisprudence," defines "safe district" as one "in which blacks are likely to elect the representative of their choice").

While "safe" normally refers to a super-majority district of 60%-65% population of the protected group, Senator Johnson sought, and District 30 includes only 50% African-American population and less than a majority of VAP. Senator Johnson's definition of "safe district,"

which the district court found to be "racial" are not race-motivated, but merely race-correlated.

Like all politicians, minority incumbents and aspiring incumbents used sophisticated analysis to select voters favorable to their candidacies. In a State with racially polarized voting, there is a strong correlation between race and support for a minority incumbent. Thus, it is quite significant that minority incumbents and aspiring incumbents did not blindly target all voters of the their own race or ethnicity and did not blindly exclude voters of a different race or ethnicity. For example, aspiring incumbent Senator Johnson preferred African Americans who were homeowners over African Americans who were more transient, TX J.S. 30a-31a. In addition, District 30 was extended to include a portion of Grand Prairie, Senator

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criticized by plaintiffs' expert, Dr. Weber, TR II:9, virtually mirrors the language of § 2, *see* PX 6E6, p. 1)(defining "safe" as a district in which blacks are "better able to participate in the electoral process by choosing their own Congressional representative").

The lower court pointed to language in a Narrative of Voting Rights Considerations submitted to the Department of Justice in connection with the request for preclearance. That document, which was not before the Legislature when it acted, indicates that the districts in Houston "result in the maximization of minority voting strength," *see* TX J.S. 21a (quoting PX 4C). Understood in context, the sentence means simply that where the population met the first *Gingles* prong, a majority-minority district was created, just as the Masters in *DeWitt* used the term "maximize" to describe their efforts to do the same. *Wilson v. Eu*, 4 Cal Rptr. 2d at 384, 417.

The district court also cites the "demand" for majority-minority districts by "numerous interest groups who appeared before legislative redistricting committee hearings." TX J.S. 61a. But since the Legislature created majority-minority districts only where consistent with *Gingles* and compactness, the occurrence of the "demands" proves nothing. *See Wilson*, 4 Cal Rptr. 2d at 388-390 (similar "demand[s]" also made by interest groups in California did not constitutionally taint Masters' plan that included deliberately drawn majority-minority districts).

Johnson's home base, with only 14.7% African-American voters, *see supra* p.9. Accommodating minority incumbents may produce district boundaries which have a *correlation* to race and ethnicity, but this correlation, like that between race and partisan affiliation, does not mean that the Legislature was "motivated by a racial purpose or object," *Miller*, 115 S. Ct. at 2487.

Similarly, the Legislature's practice of honoring voter requests to be in a particular district also cannot automatically be equated with racial gerrymandering merely because it is African Americans or Hispanics who make the request. Voters in Texas of all races sought to be placed in particular Congressional districts, and the Legislature attempted to meet those desires to the extent possible consistent with its other districting objectives.[61] A rule that allows white voter requests to be placed in white representatives' districts to be accommodated, but treats compliance with other voters' requests to be placed in minority representatives' districts as constitutionally suspect or illegal, sets up a situation which forces the State to discriminate *against* voters who support minority elected officials. This cannot be the meaning of the *Shaw* and *Miller*

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[61]For example, the overwhelmingly white, Republican community of Park Cities wished to remain in the District of white Republican incumbent Sam Johnson, explicitly expressing the desire *not* to be in the new minority opportunity district. U.S. Ex. 1038. In contrast, the African-American community of Hamilton Park in Dallas and a small African-American community in Plano desired to be in District 30, as did a Jewish community in north Dallas. The *motives* of each of these latter three communities were substantially partisan; each area had previously been in Republican District 3 and would have been kept in District 3 if their requests to be in District 30 had not been accommodated. Equally important, the *State's motive* in honoring the requests was race-neutral and applied evenhandedly to all such requests. The desires of African-American and Jewish Dallas voters are no more suspect or illegitimate than the desires of white Park Cities voters.

rulings by this Court. *Cf. Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

Finally, the district court appears to have placed heavy weight upon the fact that some minority voters who would have been in the most compact versions of Districts 18, 29 and 30 were instead put in the districts of white Democratic incumbents for partisan reasons, and therefore *different* minority voters (who would not have been residents of the most compact versions) were put in to Districts 18, 29 and 30. *See* TX J.S. 63a-64a, 67a-68a. Yet, this substitution of less compact for more compact minority residential areas was not motivated by "race for its own sake." Instead, the motives were a combination of protecting white incumbents and improving the election chances of aspiring members of the Legislature. Senator Johnson, for instance, included middle-income voters further north because she expected that the included group would have a higher voting participation rate. *Id.* at 62a-63a. Similarly, the court acknowledged that the shape of Districts 18 and 29 in Houston was constrained by "the conflicting ambitions of Representative Martinez and then-Senator Gene Green," *id.* at 66a,[62] but erroneously condemned the resulting incidental correlation as based on race.

The district court combined at least three different types of voter placement into an ultimate conclusion of racial gerrymander, failing to distinguish between minority voters who: 1) reside within the boundaries of the idealized, compact versions of the districts that it invalidated; 2) did not reside within those idealized districting versions but were added to the final districts either because they requested the change or were identified as supporters of the incumbents or aspirants for the newly created seats; or 3) were "substituted" for voters in the first category who were removed from the

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[62]*See* TX J.S. 38a n.28 (District 18's shape resulted from configuration of districts around it -- including District 29).

idealized versions to accommodate incumbents (who happened to be white) in adjacent districts. There is no way to know from the district court's opinion how many voters fall into each category. Whatever the numbers, even if they are substantial, each category flows from a motive that is constitutionally permissible and not suspect.

The district court's sweeping characterizations of the "racial" nature of the lines for Districts 18, 29 and 30 also are inconsistent with other findings concerning the importance of incumbent and partisan candidate protection in the line-drawing process and are infected with numerous errors of law, including failure to distinguish between racial *motive* and racial *correlations*. For example, the district court stated:

> Districts 18 and 29 are formed in utter disregard for traditional redistricting criteria[63] and . . . their shapes are ultimately unexplainable on grounds other than . . . racial quotas.

Id. 69a. Yet, a few pages earlier, the district court *found as to Districts 18 and 29* that *"incumbent protection boundaries"* caused the irregular shapes and that *"for the sake of maintaining or winning seats* Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts," *id.* at 55a-56a.[64]

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[63]As discussed in Point 3 above, none of Texas' districts complied with the list of "traditional" districting criteria adopted by the court below and thus such non-compliance by Districts 18, 29 and 30 does not suggest a *racial* motive.

[64]The court specifically found that the shapes of Districts 18 and 29 flowed from two non-racial factors that *correlate* with race and ethnicity: 1) the tug-of-war between Rep. Martinez and Senator Green "to place their state constituents within the new district" and 2) "to the south Congressman Andrews desired to maintain as many minority constituents [voters who had supported him, who resided in the area proposed by Congressman Washington to be added to District 18] as possible in his

As to District 30, the district court stated:

> We conclude that the contours of Congressional District 30 are unexplainable in terms other than race. Neighborhoods, VTD's and individual streets were split to achieve the district's racial mix. The district was carefully gerrymandered on a racial basis to achieve a certain number of African-American voters; in order to protect incumbents, other African-American voters were deliberately fenced out of the District 30 and placed in other districts that are equally "untraditional."

Id. at 65a. As with Districts 18 and 29, this finding reflects several legal errors: 1) the court uses the wrong test, focusing on violation of its own preferred "neutral" districting criteria, while ignoring the important and traditional Texas concern for protection of incumbents that makes the district contours "explainable" on non-racial grounds; 2) it compounds this error by ignoring the fact that many majority-white districts divided neighborhoods and VTDs to an equal extent[65] so that in Texas, the splitting of neighborhoods cannot legally support an inference of a racial motive; 3) it ignores that highly compact versions of District 30, *with the same racial mix but very different consequences for incumbents*, would have maintained the integrity of neighborhoods but were concededly rejected by the State *for the non-racial motive of protecting incumbents*; and 4) it relies on the erroneous legal conclusion that protection of the incumbents (who happen to be white) in

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Democratic district." *Id.* at 66a. The court also concluded: "In numerous instances, the *correlation* between race and district boundaries is very nearly perfect," *id. at* 59a (emphasis added). Yet, as *Miller* makes clear, mere *correlation* between race and district boundaries is not suspect.

[65] *See, e.g.*, TX J.S. 9a.

adjacent districts is itself part of and evidence of a racial gerrymander.

In effect, the court simply looked at the pattern of voter distribution in the final plan and drew the simple conclusion that race predominated throughout a legislative process that was anything but simple. That finding is, as we have shown, tainted by numerous errors of law and is entitled to no weight. It is also contrary to the emphasis of process and not just result, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), and to what this Court said in *Miller*, 115 S. Ct. at 2487 (quoting *Shaw*, 113 S. Ct. at 2826)(it is the exceptional case where a conclusion of racial gerrymandering can be drawn from a districting plan on its face).

II. *DISTRICTS 18, 29 AND 30 EACH SATISFY STRICT SCRUTINY*

Even if the "strict scrutiny" standard applies to the 1991 Texas Congressional redistricting plan, the judgment of the court below is still wrong.

The Court's decision last Term in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995), makes clear that strict scrutiny is not "fatal in fact." The Court held that "government is not disqualified from acting in response" to "the unhappy persistence of both the practice and the lingering effects of racial discrimination," which the Court realized is an "unfortunate reality" in this country, *id.*

The Constitution permits a State to take voluntary action to remedy past racial discrimination and its current effects. "There is a 'significant State interest in eradicating the effects of past racial discrimination.'" *Miller*, 115 S. Ct. at 2490 (quoting *Shaw*, 113 S. Ct. at 2831). To engage in race-conscious remedial action, the State must have "a strong basis in evidence of the harm being remedied." *Miller*, 115 S. Ct. at 2491. *Accord Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion). The State is not required "to prove the invalidity of its own

apportionment scheme" before creating majority-minority districts. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993). *See also City of Richmond v. Croson*, 488 U.S. 469, 500 (1989)("strong basis in evidence" needed to justify remedial plan); *Wygant v. Jackson Board of Education*, 476 U.S. at 289-91 (O'Connor, J., concurring) (contemporaneous findings of actual discrimination not required).

A. Districts 18, 29 and 30 Are Supported By A Compelling State Interest

The court below assumed, without deciding, that Texas had a compelling interest in creating majority-minority districts in the areas of the State where Districts 18, 29 and 30 lie. TX J.S. 69a-70a. The evidence supporting the remedial use of race in creating such districts surpasses the "strong basis is evidence" standard. Overwhelming evidence shows that the creation of such districts was justified to remedy a tragic history of discrimination and its current effects. Had it not created majority-minority districts in Houston and Dallas, the State would have fragmented large, politically cohesive minority populations and would have faced virtually certain liability for violating § 2 and, with respect to District 18, § 5 of the Voting Rights Act.

Both *Shaw* and *Miller* strongly suggest that a State has a compelling interest in acting to comply with the Voting Rights Act and thereby remedy the effects of prior discrimination in voting practices. *See Shaw*, 113 S. Ct. at 2830; *Miller*, 115 S. Ct. at 2490. Both § 2 and § 5 of the Act are remedial in nature. Section 2 operates when a history of discrimination interacts with a challenged practice or procedure with the result that "the political processes leading to nomination or election . . . are not equally open" to members of a protected class, in that "its members have less opportunity than other members of the electorate to

participate in the political process and to elect representatives of their choice."[66]

1. *Section 5 of the Voting Rights Act.*

Congressional District 18 has provided African Americans the opportunity to elect their representative of choice to Congress since the election of Congresswoman Barbara Jordan in 1971. Failure to maintain District 18 as one in which African Americans could continue to elect their representative of choice would have made the State vulnerable to a valid objection under either the retrogression or the purpose prong of § 5 of the Voting Rights Act.[67] "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Miller*, 115 S. Ct. at 2483 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). In addition to retrogression, given the State's overriding goal of protecting its incumbents, treating African-American incumbent Craig Washington any differently from white incumbents, by failing to create a district from which he could be reelected, would have given

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[66]42 U.S.C. § 1973(b). The constitutionality of § 2 of the Voting Rights Act, as interpreted by this Court's decisions, including *Thornburg v. Gingles* and *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), has not been questioned by a majority of the Court. In *Johnson v. De Grandy*, the Court ruled, one year after *Shaw*, that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity," *id.* at 2661.

[67]There is no question that it was possible in 1991 to configure a Congressional district in Houston that would permit African-American voters to elect a candidate of their choice. *See supra* pp. 3 n.6, 8.

rise to a very strong case of discriminatory intent, a current violation of the Fourteenth Amendment, as well as § 5.[68]

2. *Section 2 of the Voting Rights Act.*

In *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), this Court reaffirmed the applicability of the *Thornburg v. Gingles*, 478 U.S. 30 (1986), analysis for evaluating claims under § 2 of the Voting Rights Act. *De Grandy* confirmed that § 2 prohibits "fragmenting the minority voters among several districts where a bloc-voting majority can routinely out-vote them," "where its result, 'interact[ing] with social and historical conditions' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." 114 S. Ct. at 2656 (quoting *Voinovich v. Quilter* and *Thornburg v. Gingles* (citations omitted)). *De Grandy* applied the "three now-familiar *Gingles* factors" as "necessary preconditions" for "establishing vote dilution." 114 S. Ct. at 2656, 2657. Once those preconditions are satisfied, *De Grandy* holds that a complex "totality of the circumstances" analysis is required, in which proportionality or lack thereof is a relevant fact. *Id.* at 2647.

a. "Reasonably compact" opportunity districts.

"[W]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 115 S. Ct. at 2655. The demographic

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[68]A departure from the State's practice of protecting incumbents, by failing to protect the State's only African-American incumbent, while still protecting white incumbents, would have been highly suggestive of discriminatory intent. *See, e.g., Washington v. Davis*, 426 U.S. 229, 241 (1976); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

evidence summarized above establishes that the Legislature had more than a strong basis for believing that the African-American communities in Harris and Dallas counties were geographically compact and sufficiently large to elect their candidates of choice and that the same was true of the Hispanic population in Harris County.[69]

b. Racially polarized voting and other indicia of barriers to minority political opportunity.

The court below found that "[i]n general, some racial polarization occurs in majority-minority districts in Texas." TX J.S. 22a. Although the court did not make specific findings about Harris and Dallas counties, the existence of racially polarized voting in these counties is established by overwhelming evidence of which the Legislature was well aware.

A federal district court decided *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990), just as the redistricting process was getting underway, in a 100-page opinion well-known to the Legislature.[70] A contemporaneous court finding provides an extremely strong

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[69]*See, supra*, pp. 5-7. In view of the State's failure to give more than lip service to compactness in constructing many of its majority-white Congressional districts, it is arguable that much less compact hypothetical liability districts would have satisfied the first *Gingles* threshold condition. *See Johnson v. De Grandy* 114 S. Ct. at 2659 ("where a State has split (or lumped) minority neighborhoods that would have been grouped into a single district (or spread among several) *if the State had employed the same line-drawing standards in minority neighborhoods that it used elsewhere in the jurisdiction*, the inconsistent standard may be significant evidence of a §2 violation, even in the face of proportionality"). "Reasonably compact" under *Gingles* is a relative concept that draws meaning from the State's general districting practices. *Jeffers v. Clinton*, 730 F. Supp. 196, 207 (1989), *aff'd*, 498 U.S. 1019 (1990).

[70]*See, e.g.*, Lawson Ex. 7 ¶ 15.

basis for remedial consideration of race in districting in the Dallas area. The Court in *Williams* made findings of fact on virtually all of the factors relevant under § 2 of the Voting Rights Act. *See, e.g.*, 734 F. Supp. at 1320 ("history of minority participation in the political process of Dallas is not one of *choice*; it is a record of what blacks and Hispanics have been *permitted* to do by the white majority"); *id.* at 1393 ("white bloc voting in Dallas . . . usually defeats the preferred choice of African Americans"); *id.* at 1394 (summarizing record of white bloc voting since 1975);[71] *id.* at 1347-49, 1363 (racial appeals in Dallas elections).[72] In

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[71]The *Williams* court found that African-American candidates who ran in the 1961, 1963, and 1965 city council elections were "defeated by massive white bloc voting in North Dallas and in the other white areas of the City," *id.* at 1321. More than ten years later, in a declaratory judgment preclearance suit, *City of Dallas v. United States*, 482 F. Supp. 183, 184 (D.D.C. 1979), "the City admitted that the white majority votes as a bloc to enable it to defeat the minority's preferred candidate," *id.* at 1351. In 1983, African-American community leaders chose the best candidate they could find, Marvin Robinson, to run in the next at-large election. They unsuccessfully tried to raise money from white business and community leaders and other whites with whom they had worked. In a runoff, Robinson was soundly defeated by the white candidate. He obtained almost all of the black vote but only 11 percent of the white vote. *Id.* at 1323-1324. Between 1983 and 1990, "no *serious* black candidate [ran] for an at-large seat in the Dallas City Council elections because they perceived that it was impossible to win," *id.* *See also id.* at 1396.

[72]The *Williams* opinion cited "substantial economic disparities between white and minority residents of Dallas," *id.* at 1382; *see also id.* at 1403, as well as educational differences. "Credible testimony established that these socio-economic disparities [in education, employment, housing, and political opportunities available to minorities in Dallas] adversely affect political participation by blacks and Hispanics, and that they are 'a reflection of prior discrimination in the community.'" *Id.* at 1403. The court also found that "for over 50 years," up to as recently as 1989, "the City of Dallas had caused, had supported, and had perpetuated racial segregation and discrimination in low-income public housing programs in this City," *id.* at 1377. The court stated that "the City simply continues

light of this ruling, the Legislature was strongly justified in concluding that the *Gingles* second and third preconditions, as well as the "totality of the circumstances," would weigh in favor of liability under § 2 if it failed to draw a majority-African-American district in Dallas.[73]

Similarly, there was substantial expert evidence submitted to the court below supporting the conclusion that racially polarized voting was pervasive in the Houston and Dallas areas. The State's expert witness, Dr. Allan Lichtman, found a substantial pattern of polarized voting, with African Americans voting cohesively, Hispanics voting cohesively and whites usually voting as a bloc against African-American and Hispanic candidates. In District 29, the mean percent of whites voting for Hispanic candidates in non-judicial elections was 6%. TX Ex. 14, Appendix 2, Table 8. In District 30, the mean white vote for African-American candidates in non-judicial elections was 11%, *id.*

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to refuse to recognize that it has *any* responsibility to help solve the monumental problems that are the legacy of the City's mistake in having the West Dallas project built to keep at least 3,500 blacks out of the white areas of Dallas," *id.* at 1378.

[73]In addition to *Williams*, the State and its political subdivisions had been repeatedly sued under the Voting Rights Act, and court decisions finding high levels of racially polarized voting had been made in virtually every area of the State with significant minority population. *See* J.A. 359-362; TX Ex. 17 at 7-24. As a white Representative who played a key role in constructing districts put it: "There was not a single member of the Texas Legislature who was totally unaware of the existence and history of racially polarized voting in the Houston/Harris County area, in Dallas and in South Texas." J.A. 251-52 (Testimony of Paul Colbert). Senator Rodney Ellis, one of only two African Americans in the State Senate, confirmed: "In the Houston area, people vote largely along racial lines." Lawson Ex. 7 ¶ 6.

at Table 9, while in District 18 it was 16%, *id.* at Table 3.[74] Plaintiffs' expert, Dr. Ronald Weber, agreed with much of Dr. Lichtman's analysis and found similarly high or higher levels of racially polarized voting in Districts 18, 29 and 30 in both primary and general elections. *See* PX 36E, Att. F.[75]

Finally, the court below found: "Texas has a long, well-documented history of discrimination that has touched upon the rights of African Americans and Hispanics to register, to vote, or to participate otherwise in the political

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[74]Dr. Lichtman employed ecological regression analysis, the standard method for estimating the voting behavior of demographic groups from data reported for political units. TX Ex. 14, Appendix 1 (Report of Dr. Allan Lichtman). He supplemented ecological regression with extreme case analysis of 90%+ white, African-American and Hispanic precincts. *Id.* at Appendix 2.

[75]Although the district court noted Dr. Weber's conclusion that the level of racially polarized voting in currently existing districts "for the most part . . . is not legally or politically consequential," J.A. 182 ¶ 41, cited at TX J.S. 23a, this conclusion is irrelevant to the analysis concerning the § 2 or § 5 implications of *failure* to create majority-minority districts. The concept of "legally significant racially polarized voting" is district-specific and depends on whether, given the proportions of minority and non-minority population and the level of bloc voting, whites usually can defeat the candidate of choice of minority voters. *Gingles*, 478 U.S. at 55, 57. This condition by definition does not exist in a successful, remedial district created under the Voting Rights Act. Dr. Weber's conclusion about "legally consequential" racially polarized voting in the current Districts 18 and 30, J.A. 182-183, is not surprising since the white population in these districts is too small to defeat the candidates of choice of the African-American and Hispanic communities. Dr. Weber's report and testimony simply do not address whether "legally significant" racially polarized voting would have existed had the State fragmented the African-American population so that it did not constitute an effective voting majority in any Congressional district in the Houston or Dallas regions.

process." TX J.S. 23a.[76] The only minority candidates elected to Congress from Texas since Reconstruction have been elected from majority-minority districts, such as Districts 18, 29 and 30. *See* TX Ex. 17, at 55 (Report of Dr. Chandler Davidson). The same holds true for State Senate seats. *Id.* at 51.[77]

Had the State not drawn districts to give recognition to the voting strength of the large and geographically compact African-American and Hispanic populations in Houston and Dallas, plaintiffs suing under § 2 of the Voting Rights Act would have been able to present conclusive proof of all three of the *Gingles* threshold conditions and would have had a very high likelihood of prevailing under the "totality of the circumstances" standard. The Legislature was

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[76]*See, e.g.*, State Ex. 17 (Report of Dr. Chandler Davidson); J.A. 357 (Declaration of Dr. Charles L. Cotrell); Lawson Ex. 8 ¶¶ 3-13 (statement of William M. Hale).

[77]Testimony at the Outreach Hearings conducted throughout the State prior to redistricting and testimony admitted at trial establishes that white representatives had been unresponsive and insensitive to the needs of the minority populations in their districts. *See, e.g.*, PX15I at 10 (testimony of T. Molina of the Business Committee of the Southeast Texas Hispanic Council); PX15L at 34-35 (testimony of D. Hicks of the Dallas Black Chamber of Commerce); PX15Q, tape 1, at 13 (testimony of T. Campos); *id.*, tape 2, at 7 (testimony of J. Mata); PX17, tape 1, at 16; PX15Q, tape 1, at 9-10 (testimony of M. Almendarez, representing Imagene de Houston and the Hispanic precinct judges in Harris County); Lawson Ex. 1 ¶¶ 5, 7, 10, 12 (statement of Albert Black); Lawson Ex. 4 ¶¶ 8-13 (statement of Comer Cottrell); Lawson Ex. 11 ¶¶ 13, 14, 16, 17 (testimony of former House member Jerald Larry); Lawson Ex. 17 ¶¶ 3, 4 (statement of former House member Jesse Oliver); Lawson Ex. 7 ¶ 10 (statement of Senator Rodney Ellis); Lawson Ex. 21 ¶ 13 (statement of Grady W. Smithey, Jr.).

more than justified in recognizing this reality and voluntarily complying with the requirements of the Voting Rights Act.

B. Districts 18, 29 and 30 are Narrowly Tailored

1. *Districts 18, 29 and 30 meet this Court's requirements for narrow tailoring.*

This Court's precedents identify the appropriate analysis to determine whether a race-conscious remedy is narrowly tailored. The Court has looked at factors such as 1) the existence of alternative remedies; 2) whether the plan is a "rigid" quota or a flexible "goal"; 3) the duration of the plan; 4) the pool of individuals benefitted by the plan; and 5) the effect of the plan on third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987); *Wygant v. Board of Education*, 476 U.S. at 279-84. Districts 18, 29 and 30 easily satisfy these tests of narrow tailoring.

There is no available race-neutral alternative means of remedying a history of political exclusion and complying with the Voting Rights Act.[78] Texas' plan is flexible and its voting rights districts do not function as quotas. They do not prohibit non-minorities from running for office. In fact, white candidates have won election in such districts, currently including two of Texas' nine majority-minority districts. *See also, e.g., Johnson v. De Grandy*, 114 S. Ct. at 2665, 2697 (Kennedy, J., concurring in part and concurring in the judgment)("[t]he assumption that majority-minority districts elect only minority representatives . . . is false as an empirical matter"). They do not prohibit any voter from voting for the candidate of his or her choice. The African-American districts have only bare population majorities,

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[78]Scholars have suggested cumulative or limited voting systems, combined with multi-member districts as a less race-conscious alternative, but a federal statute requires, with an exception not applicable in Texas, that members of the House of Representatives be elected from single-member districts. 2 U.S.C. § 2c.

while in District 29, which has not yet elected the candidate of choice of the Hispanic community,[79] Hispanics represent only 55% of the voting-age population. None of these Districts guarantees results, each merely attempts to provide an equal opportunity to minority voters, and the voters in the districts can alter the results every two years.

A Congressional redistricting plan is by its nature temporary. It will last only until the next decennial census, at which time the Legislature without doubt will reevaluate whether racially polarized voting persists and whether race-conscious districting remains necessary.

As to the fourth and fifth factors, a plan that fairly reflects the voting strength of both the minority and non-minority population does not impose an undue burden on third parties. The State's plan does not dilute the voting strength of white voters and does not advantage minority voters, but merely attempts to provide them an *equal* opportunity. The State did not create more minority opportunity districts than § 2 requires and it did not place more African-American or Hispanic voters in the opportunity districts than was reasonably necessary to provide minorities with an opportunity to elect candidates of their choice.[80]

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[79]*See* J.A. 230-31 (TX Ex. 14).

[80]Plaintiffs' expert claimed that Districts 18 and 30, but not District 29, were "overly safe," TR III:81, even though Districts 18 and 30 have only a bare majority in African-American voting age population and less than a majority in VAP. At the same time, Dr. Weber's own plan *increased* the minority concentrations in some districts, for example, to over 73% Hispanic in District 15, which Dr. Weber did not believe was "overly safe." TR III:33. Dr. Weber's "overly safe" assertion was based on speculation that African Americans and Hispanics would vote cohesively as a combined minority coalition. This speculation, unsupported by any evidence, was refuted by strong evidence of lack of coalition voting. *E.g.*, TX J.S. 22a. The District Court apparently did not agree with the "overly safe" claim, which is understandable since this

2. *The court below erred in interpreting narrow tailoring to incorporate its own preferred, "ideal" districting criteria.*

The court below ruled that narrow tailoring requires "the least possible amount of irregularity in shape." TX J.S. 72a. Under this ruling, race plus compactness must be the *exclusive* determinant of districts drawn to serve a compelling interest.

The lower court's narrow tailoring ruling was based on an incorrect understanding of *Shaw*. The district court reasoned: "Because a Shaw claim embraces the district's appearance as well as its racial construction, narrow tailoring must take both of these elements into account." TX J.S. 72a. *Miller v. Johnson* makes clear that the *Shaw* claim does not "embrace" the district's appearance, but only the State's predominant motive. Shape is relevant only as evidence of an improper motive. Once the *motive* for creating a majority-minority district is found to be supported by a compelling interest, there is no reason to incorporate district shape into the narrow tailoring analysis, especially in a State such as Texas where many districts are equally irregular in shape.

a. The decision below forces the State to discriminate against minority communities of interest and minority incumbents.

By imposing a special, regular-shape-maximization requirement *only* on majority-minority districts, the court below mandates that the State discriminate *against* racial minorities, compared to other groups seeking recognition of their voting strength. Texas' majority-white districts are just

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Court has held that different minority groups should not be combined to assess Voting Rights Act compliance unless political cohesion between the two groups is proved. *Growe v. Emison*, 113 S. Ct. 1075 (1993).

as irregularly shaped and cover much more territory, but are not required to maximize compactness.

Under the rule established by the court below, a State may construct *irregular* districts to recognize the voting strength of any group that is not a historically disadvantaged racial minority -- even on the basis of suspect classifications, such as partisan affiliation[81] or religion. Yet, to obtain a district that recognizes their interests, racial minorities must convince Texas to forsake all of its other districting goals and, even more to maximize the regular shape of opportunity districts. This heaps an additional disadvantage on minority groups which already suffer barriers to participation in the political process.[82]

The ruling below also requires the State to discriminate against minority incumbents and would-be incumbents. To achieve other important State and non-racial interests, Craig Washington's District 18 became irregular, just like the districts of white incumbents in Harris County. By singling out one incumbent on the basis of race and requiring his district to maximize regularity of shape, the district court turns the only African-American incumbent into a redistricting pariah, who is constitutionally disabled from cooperating with his colleagues to accommodate highly-valued State interests. It is unfair to force minority politicians to defy the strong State tradition which all other Texas politicians follow as stalwarts of their political organization.

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[81] *See Bandemer*, 478 U.S. at 143 (partisan vote dilution occurs only when electoral system consistently degrades voters' influence on system as a whole).

[82] "Singling out the political processes affecting racial issues for uniquely disadvantageous treatment" violates Equal Protection. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 486 n.30 (1982).

Similarly, although Districts 29 and 30 had no incumbent, two State Senators, one white and one African-American, and a Hispanic Representative, were treated as other functional incumbents in the Texas tradition. The court below erred in ruling that *Shaw* requires the State to treat these aspirants differently than other incumbents, based on their race, or that of their constituents.

b. The decision below violates the principle of federalism.

The lower court's conclusion means that a State has less flexibility when it acts *voluntarily* than when it waits to be sued under § 2. After finding a violation, the federal court must give the State an opportunity to devise a plan that will remedy the violation most consistently with the State's self-defined districting goals. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)(quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966))("a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional shall not be constricted" more than necessary to provide a remedy), 542-43 (same principle applies to remedy for Voting Rights Act violation). Contrary to the holding of the court below, a State interest is not required to be "compelling" before it can be accommodated at the same time that a remedy is crafted. *E.g. Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("[t]he federal courts in devising a remedy must take into account the interests of State and local authorities"). The district court's double standard, allowing States which wait to be sued to use their normal discretion in designing a remedy that best serves the State's interests, is contrary to the federal policy of encouraging voluntary compliance and will open the floodgates of unnecessary litigation.

The definition of narrow tailoring adopted below converts the rationale of *Shaw v. Reno* and *Miller v. Johnson* from an anti-discrimination principle to a constitutional prohibition on *non-racial* influences on the shape of minority

opportunity districts and thus undermines the principle of federalism. Where a regularly shaped version of an opportunity district is rejected for non-racial reasons, such as incumbent protection, partisan political considerations, and the desires of residents, the plan is narrowly tailored because it accomplishes the race-conscious remedial objective in the manner that does least damage to other important State interests. Texas' 1991 Congressional districting plan meets this standard and therefore the district court should be reversed and the plan upheld.

III. *THE PLAINTIFFS LACK STANDING*

United States v. Hays emphasized that the well-established Article III requirements for standing apply with full vigor to the constitutional claim recognized in *Shaw*. *See* 115 S. Ct. 2431 at 2435, *citing, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *Allen v. Wright*, 468 U.S. 737 (1984); *id.* at 645. *Allen*, the Court said, "made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.'" *Id.* (citations omitted).

The Court "discussed the harms caused by racial classifications in *Shaw* . . . Any citizen *able to demonstrate that he or she, personally, has been injured by that kind of racial classification* has standing to challenge the classification in federal court." *Id.* at 2436 (emphasis added). In *Hays*, the Court concluded that the plaintiffs lacked standing to challenge a Congressional district they alleged was fashioned by "purposefully distinguish[ing] between voters on the basis of race," *id.* (quoting *Shaw*, 113 S. Ct. at 2826), because they did not live within the district and hence could not "suffer those special harms."

Nothing in *Hays* indicates, however, that residency within a challenged district, without more, suffices to

establish standing to sue. Rather, the Court was careful to note that "[v]oters [residing] in such districts *may* suffer the special representational harms racial classifications can cause in the voting context," 115 S. Ct. at 2436 (emphasis added). Thus, to establish their standing in the case at bar, the plaintiffs were required to allege *and prove*[83] not only that they resided within the challenged districts *but also that they personally suffered the harms caused by the alleged racial classifications*. The court below made no findings that would support plaintiffs' standing, and it could not have done so because plaintiffs failed to prove any such injury. Accordingly, this action should be remanded with instructions to dismiss their complaint. *See Hays, id.* at 2436, 2437.

Hays and *Shaw* describe two types of harm that may be suffered by individual residents of a district in the construction of which voters were differentiated on the basis of race: "stigmatic" harm[84] and "representational" harm.[85] None of the plaintiffs in this case alleged or proved that he or she suffered either of such harms. Their complaint alleged no injury, only that they "ha[d] standing,"

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[83]The standing inquiry continues throughout the course of litigation; standing, if controverted, "'must be "supported adequately by the evidence adduced at trial"' to avoid dismissal on standing grounds," 115 S. Ct. at 2435 (citing, *e.g.*, *Lujan*).

[84]"[R]acial classifications . . . in general, . . . 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.'" 115 S. Ct. at 2436 (*quoting Shaw*). Of course, stigmatization by itself is not sufficient unless some personal harm flows from it. *Allen v. Wright*.

[85]"We also noted [in *Shaw*] 'representational harms' the particular type of racial classification at issue in *Shaw may* cause: When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." 115 S. Ct. at 2436 (emphasis added).

J.A. 39 ¶ 31, which was controverted by intervenors, *id.* at 56 ¶ 31, 60 ¶ 28, and was not proved.

First, plaintiff Chen resides in Congressional District 25 (Chen Dep. 21-22) and thus under *Hays* lacks standing to challenge any of the three invalidated districts at issue on this appeal. Second, the testimony of the other plaintiffs was inadequate to demonstrate their standing. Plaintiff Blum's complaints about the representation provided by Congressman Washington were not based on race and were shared by so many of the district's voters that Washington was defeated by Rep. Sheila Jackson Lee. Blum's only purported "stigmatic" injury related to his belief in "color-blind" districting, *see* TR I:23,[86] which was also the only injury asserted by the other plaintiff residing within District 18, *see* Powers Dep. 48.

Other plaintiffs gave evidence inconsistent with assertions of representational harm. Plaintiff Thomas had been "very, very favorably impressed" with nominee Sheila Jackson Lee and expected that she would be a good Representative. Thomas Dep. 74. Ms. Thomas said that Sheila Jackson Lee does not ignore white voters, and that she expected that as a Congresswoman, Rep. Lee would

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[86]This Court has recognized that districting need not be "colorblind" to pass constitutional muster. *E.g.*, *Miller*, 115 S. Ct. at 2490 (permissible to recognize relevant interests of members of racial group who live together in one community); *see, e.g.*, *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring) (redistricting always involves competing "political, religious, ethnic, racial, occupational, and socioeconomic groups"). It is only when all or virtually all other districting principles are *subordinated* to race that a *Shaw* claim may arise. *Miller*, 115 S. Ct. at 2488. Thus, a complaint that districting was not "colorblind" neither states a claim nor describes an injury in fact that is sufficient to confer standing.

reach out to white voters and try to build racial bridges. *Id.* at 78. Plaintiff Vera stated that he had been represented by African-American Congresswoman Barbara Jordan while he was a resident of District 18; that he visited Rep. Jordan in Washington; and that he "supported" her, thought she was "a good congresswoman, conscientious," who "paid attention to her constituents." Vera Dep. 63.

Plaintiff Barbara Thomas, who now resides in District 29, likewise expressed her belief in "colorblind" districting, Thomas Dep. 69-70, but indicated that she did not regard her Congressman (Rep. Gene Green) as an adequate representative because he is a Democrat, *id.* at 47. Thomas characterized her concern with the consideration of race in the districting process as a "theoretical" one, *id.* at 69-70, and stated that she *did not feel discriminated against* and *was not segregated*, *id.* at 70-71 (emphasis added). The other plaintiff residing in District 29, Mr. Vera, supports "colorblind" districting, Vera Dep. 18, but expressed no complaints about inadequate representation by Congressman Green, whom he corresponds with "all the time" and whose office he visits "quite often," *id.* at 66.

The remaining plaintiff, Pauline Orcutt, resides within District 30 in Dallas. She stated that Congresswoman Johnson does not represent her because she (Orcutt) has a conservative philosophy and Rep. Johnson is an "ultraliberal" who supports President Clinton (Orcutt Dep. 20-24). Orcutt admitted that these complaints, and the disenchantment of some District 30 residents with Rep. Johnson, are not related to race, *id.* at 26, but rather are partisan in nature, *id.* at 84-85.

Strong, uncontradicted evidence shows that the Congressional representatives of Districts 18, 29 and 30 effectively represent their constituents, regardless of race or ethnicity.[87] The only evidence on racial stereotypes shows that minority opportunity districts help break down, rather than reinforce these notions, by giving highly qualified minority representatives, such as Barbara Jordan, exposure in the white community.[88] Moreover, analysis of voting returns in Congressional elections in Texas before and after the 1991 redistricting indicate *increases* in white crossover voting for African-American and Hispanic candidates in the areas now contained in all but two of the State's minority

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[87]*See, e.g.*, Lawson Exs. 7 ¶ 11; 9 ¶ 11; 10 ¶¶ 4, 9 (white voter in District 18); 12 ¶¶ 5, 7; 13, ¶ 3, 21 ¶¶ 9, 11, 16 (white voter in Dallas County); 22 ¶¶ 4, 6-7, 9 (white voter in District 30); 23 ¶¶ 10-14; 25 ¶¶ 7-9, 12 (white voter in District 30).

[88]*See* Lawson Ex. 7 ¶ 6 ("Barbara Jordan's . . . strong example made it easier for other African-American elected officials to gain some level of acceptance in the white community.").

opportunity districts,[89] a further indication that the "representational" harm identified in *Shaw* has not occurred in Texas minority opportunity districts following the enactment of the challenged reapportionment plan.

Under these circumstances, the district court should have dismissed this litigation for want of jurisdiction; and this Court should now vacate the lower court's decision and remand for that purpose.

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[89]The following chart is based upon the information contained in Tables 1-9, Appendix 2, to the Final Report of Dr. Allan J. Lichtman, TX Ex. 14. The body of the report is set out at J.A. 203.

% White Vote for African-American/Hispanic Candidates
in Contests with White Candidates in Texas'
1991 Redistricting Minority Opportunity Districts*

Minority Opportunity District #	1992 Elections	Pre-1992 Elections
15	37%	22%
16	33%	30%
18	29%	24%
20	25%	6%
23	16%	9%
27	50%	27%
28	0%	7%
29	5%	5%
30	64%	15%

*Percentages shown are averages for statewide, countywide and legislative district elections held within the precincts of the minority opportunity districts under the 1991 plan. 1992 averages for Districts 27, 28 and 30 are based on one election.

CONCLUSION

The complaint should be dismissed for lack of standing. In the alternative, the decision of the district court finding Texas Congressional Districts 18, 29 and 30 constitutionally invalid should be reversed, and the complaint should be dismissed.

Respectfully submitted,

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